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No. 00-767

IN THE

Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

v.

ENRICO ST. CYR,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amici Curiae will address only the following question presented:

Whether the district court had habeas corpus jurisdiction over respondent's challenge to his final removal order.

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INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center based in Washington, D.C., with supporters across the Nation. WLF regularly appears in legal proceedings before federal and State courts to combat illegal immigration and to ensure that aliens who commit crimes are excluded from American society. *See, e.g.*, *Zadvydas* v. *Underdown*, No. 99-7791 (argued Feb. 21, 2001); *Reno* v. *American-Arab Anti-Discrim. Comm.*, 525 U.S. 471 (1999); *Ogbomon* v. *United States*, 519 U.S. 1073 (1997); *INS* v. *Elramly*, 518 U.S. 1051 (1996). WLF submits this brief in support of Petitioner and with the consent of all parties. Letters of consent have been filed with the Clerk of the Court.[1]

STATEMENT

In the interest of judicial economy, WLF incorporates by reference the factual statement as it appears in the petition for writ of certiorari filed by the United States. In addition, we wish to emphasize certain aspects of the record.

Enrico St. Cyr is a citizen of Haiti who entered this country legally in 1986 but who, in 1996, "pleaded guilty in Connecticut state court to the sale of a controlled substance." U.S. Pet. 9. In 1997 the Immigration and Naturalization Service (INS) began formal proceedings to remove St. Cyr from the country because of his conviction for drug trafficking. *See id.*

Before the removal proceedings against St. Cyr commenced, an Act of Congress dramatically changing

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than the Washington Legal Foundation, its supporters, and its counsel made a monetary contribution to the preparation and submission of this brief.

federal immigration law took effect. As characterized by the United States, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) was one of two statutory reforms "designed in large part to reduce the opportunities for criminal aliens to obtain administrative relief from deportation, and to facilitate their removal from the United States by restricting and streamlining the process of judicial review of their deportation orders." *See* U.S. Pet. 2. Under IIRIRA a resident alien convicted of an aggravated felony is subject to removal. *See* 8 U.S.C. § 1227(a)(2)(A)(iii). Indeed, IIRIRA declares such aliens *categorically* ineligible for discretionary relief. *Id.* at §§ 1229b(a)(3), 1229b(b)(1)(C).

Besides these changes in the substantive law governing eligibility for discretionary relief, IIRIRA reshaped the procedural landscape for criminal aliens seeking relief from a final removal order. IIRIRA repealed 8 U.S.C. § 1105a, which had formerly vested district courts with jurisdiction to grant the writ of habeas corpus to aliens detained pending removal. IIRIRA § 306(b), 110 Stat. 3009-612. In its place IIRIRA enacted a new provision, 8 U.S.C. § 1252, which directs that judicial review of final removal orders is available only on petition for review in the courts of appeals. *See* 8 U.S.C. § 1252(a)(1). To this restriction on judicial review Congress added the following:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available

> only in judicial review of a final order under this section . . . .

Id. at § 1252(b)(9). To cap it off, under the heading of "Matters not subject to judicial review," *Id.* at § 1252(a)(2), IIRIRA further restricted the scope of judicial review by making it unavailable to aliens ordered removed because of the commission of an aggravated felony:

> Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed [an aggravated felony] . . . .

Id. at § 1252(a)(2)(C).

In spite of these substantive and procedural hurdles, St. Cyr sought discretionary relief. At his administrative hearing he argued that he was entitled to discretionary relief, despite the fact that Congress had since repealed the statutory provision on which he relied. *See* U.S. Pet. 9. The immigration judge declined, ordering St. Cyr removed to Haiti. *Id.* St. Cyr nonetheless pressed the same argument before the Board of Immigration Appeals (BIA), which affirmed. *Id.* BIA underscored that IIRIRA renders St. Cyr "'statutorily ineligible for cancellation of removal as his criminal conviction constitutes an aggravated felony.'" U.S. Pet. App. 95a.

Unwilling to concede defeat, St. Cyr filed a petition for habeas corpus in district court. U.S. Pet. 10. There he continued to maintain his eligibility for discretionary relief. *Id.* This time his persistence paid off. The district court accepted his argument that

IIRIRA did not divest it of habeas jurisdiction because St. Cyr's felony conviction was entered before IIRIRA's effective date. *See id.* Finding that it had jurisdiction, the court ruled against the government on the merits and entered an order "directing the BIA to entertain [St. Cyr's] application for relief under the repealed Section 1182(c)." *Id.*

The government appealed to the Second Circuit, which affirmed. In reaching its decision, the majority claimed to be merely following its decision in *Calcano-Martinez* v. *Reno*, 232 F.3d 328 (2d Cir. 2000). There the same panel that issued the decision below had held that IIRIRA failed to "divest [district] courts of their habeas jurisdiction under 28 U.S.C. § 2241 to review statutory and constitutional challenges to final removal orders when no other avenue for judicial review is available." U.S. Pet. App. 6a.

The court arrived at this destination in three stages. First, citing 8 U.S.C. § 1252(a)(2)(C), it held that IIRIRA generally deprives circuit courts of jurisdiction over a petition for review brought by an alien ordered removed because of the commission of a felony. U.S. Pet. 11. The single exception occurs when a petition for review is brought solely to challenge the BIA's conclusion that the petitioner qualifies for removal as an alien who has committed an aggravated felony. *Id.* Second, the court held that, despite the sweeping changes inaugurated with the passage of IIRIRA, district courts retain habeas jurisdiction under 28 U.S.C. § 2241 to review a final removal order issued on account of an alien's commission of an aggravated felony, so long as the claims are "purely legal in nature." U.S. Pet. App. 54a. Third, the *Calcano* Court interpreted this Court's precedent

in *Felker* v. *Turpin*, 518 U.S. 651 (1996) and *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868) to mean that "Congress must explicitly mention § 2241 or general habeas jurisdiction to repeal it." *Id.* at 62a. Because it found neither an express citation to § 2241 or the words "general habeas jurisdiction" in IIRIRA, the Second Circuit reasoned that Congress had not intended to deny district courts habeas jurisdiction.

Bolstering this conclusion, the court of appeals said, was its sense of constitutional doubt about the government's contrary reading of IIRIRA. Given its understanding that IIRIRA deprived circuit courts of jurisdiction on direct review, the court worried that "[a]n interpretation that repeals habeas corpus jurisdiction as it applies to legal permanent residents ordered removed from the country because of prior crimes would therefore raise a serious constitutional question under the Suspension Clause of the Constitution." *Id.* at 68a.

Because St. Cyr was convicted of an aggravated felony, for which the Second Circuit found that IIRIRA bars him from raising his claims in a petition for review filed with the court of appeals, the court concluded that "no other avenue for judicial review is available" to him. U.S. Pet. 10–11. On that basis the court concluded that the district court had jurisdiction over St. Cyr's habeas petition. *See id.* at 10. A petition for certiorari followed and was granted on two questions. WLF will address only the first, namely, whether the district court had habeas corpus jurisdiction over St. Cyr's challenge to his final removal order. *Id.* at i.

SUMMARY OF ARGUMENT

The Second Circuit has ruled that the district court had jurisdiction to review St. Cyr's habeas corpus petition brought to challenge the validity of a final removal order issued against him. In arriving at this remarkable conclusion the court of appeals cited the familiar principle of constitutional doubt, claiming that a contrary interpretation of the relevant statutes would "raise a serious constitutional question under the Suspension Clause of the Constitution." U.S. Pet. App. 68a. For three reasons, the court of appeals erred.

First, the canon of constitutional doubt is misapplied when used to thwart the evident intent of Congress. It may be invoked only when a statute fairly admits more than one reading and when a constitutional issue may be avoided by selecting one interpretation rather than another without distorting the plain meaning of the statute.

Second, the language of IIRIRA unambiguously excludes the possibility of preserving habeas corpus jurisdiction in district courts to review the final removal orders of an alien like St. Cyr, who has committed an aggravated felony. *See* 8 U.S.C. § 1252(a)(2)(C).

Third, if read according to its plain meaning, IIRIRA does not offend the Suspension Clause. That Clause was originally understood to impose a disability on Congress's power to suspend the Great Writ, not to support an inherent habeas corpus jurisdiction in federal courts. Moreover, even if original understanding is not treated as talismanic in this case, the precise context of the question presented—a restriction on the habeas corpus jurisdiction of district courts in a

narrow category of immigration cases—gives the Court additional reasons to reject the Second Circuit's invocation of constitutional doubt and, with it, the court's interpretation of IIRIRA.

ARGUMENT

The Second Circuit mistakenly held that the district court had jurisdiction to review St. Cyr's petition for habeas corpus. *See* U.S. Pet. App. 6a. In arriving at this conclusion the court of appeals was guided, it said, by the familiar principle of constitutional doubt. Citing the Suspension Clause of Article I, § 9, the Second Circuit claimed that it was avoiding the "serious constitutional question" that it feared would arise from "[a]n interpretation that repeals habeas corpus jurisdiction as it applies to legal permanent residents ordered removed from the country because of prior crimes." U.S. Pet. App. 68a. Because the court of appeals misapplied the canon of constitutional doubt, its interpretation of IIRIRA should be rejected.

I. THE CANON OF CONSTITUTIONAL DOUBT IS MISAPPLIED WHEN USED TO THWART THE EVIDENT INTENT OF CONGRESS

The court of appeals misapplied the canon of constitutional doubt. That principle directs a court to follow a rule of hermeneutic prudence: "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909). However, even this venerable principle of statutory interpretation has clearly drawn limits. "'Although this Court will often strain to

construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . .' or judicially rewriting it." *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 841 (1986) (quoting *Aptheker* v. *Secretary of State*, 378 U.S. 500, 515 (1964)). Put succinctly, this Court has said that it will not allow this principle to transform an Act of Congress into "a blank sheet of paper." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 216 (1995).

The Court's reasoning in *Miller* v. *French*, 530 U.S. 327 (2000) is instructive. At issue there was the constitutionality of the automatic stay provision of the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321, 1366-77 (1996) (PLRA). The automatic stay provides that if a district court does not rule within 30 days on a motion to terminate prospective relief affecting prison conditions, the motion will operate as a stay of the decree beginning 30 days after the motion is filed. 18 U.S.C. § 3626(e)(2). The 1997 amendments added a provision permitting a court to postpone the beginning date of this stay for no more than 60 days beyond the initial 30 days for good cause. *Id.* at § 3626(e)(3). The stay ends as soon as the court rules on the motion to terminate. *Id.* at § 3626(e)(2).

On certiorari the Court addressed whether the provision "permits federal courts, in the exercise of their traditional equitable authority, to enjoin operation of the PLRA's automatic stay provision," *Miller*, 530 U.S. at 335, and, if not, whether the automatic stay provision, interpreted this way, violates the separation of powers. The United States contended that the automatic stay provision "should be construed to leave intact the federal courts' traditional equitable discretion

to 'stay the stay.'" *Id.* In part the government relied on the canon of constitutional doubt, asserting that reading the automatic stay provision to eliminate the courts' equitable power would "raise serious separation of powers questions," *id.*, which the government urged the Court to avoid by adopting its saving construction.

The Court rejected the government's proposed saving construction entirely. Interpreting the statute to leave federal courts discretion to "stay the stay" would, the Court said, "subvert the plain meaning of the statute, making its mandatory language merely permissive." *Id.* at 336. "To allow courts to exercise their equitable discretion to prevent the stay from 'operating' during this statutorily prescribed period would be to contradict [a statute's] plain terms. It would mean that the motion to terminate merely *may* operate as a stay, despite the statute's command that it 'shall' have such effect." *Id.*

In rejecting the government's saving construction, the Court emphasized that the canon of constitutional doubt does not justify a court in thwarting the evident intent of Congress. "[W]hile this construction raises constitutional questions, the canon of constitutional doubt permits us to avoid such questions only where the saving construction is not 'plainly contrary to the intent of Congress.'" *Id.* at 338 (quoting *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). Because the Court determined that the government's proposed saving construction would gut the statute, the Court concluded that it could not fairly avoid the separation of powers issue. *Id.* (Which, incidentally, was revealed as a paper tiger. *Id.* at 341–42.)

Two lessons stand out. First, this Court will apply the canon of constitutional doubt only when the saving construction does no violence to the statutory language. Second, a constitutional issue that initially appears to warn of statutory invalidity may turn out to be a false alarm.

II. CONGRESS PLAINLY INTENDED TO REMOVE HABEAS JURISDICTION FROM DISTRICT COURTS IN CASES WHERE A REMOVAL ORDER HAS BEEN ISSUED AGAINST AN ALIEN WHO HAS COMMITTED AN AGGRAVATED FELONY

IIRIRA reflects Congress's deliberate efforts to hasten the removal of criminal aliens from this country. *See Yang* v. *INS*, 109 F.3d 1185, 1195 (7th Cir. 1997). Thus it is no surprise that the language of the statute cannot fairly bear the construction adopted by the Second Circuit. To read IIRIRA, as the court of appeals did, to mean that district courts retain habeas corpus jurisdiction over claims brought by aliens ordered removed because of an aggravated felony is to "judicially rewrit[e] it." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986).

On this point of jurisdiction Congress legislated with ample clarity. With the passage of IIRIRA it expressly repealed 8 U.S.C. § 1105(a), which had formerly authorized habeas corpus for prisoners detained pending removal. IIRIRA § 306(b), 110 Stat. 3009-612. Under the rubric of "Matters not subject to judicial review," Congress included the following provision: "Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" one of several named

criminal offenses including aggravated felonies. 8 U.S.C. § 1252(a)(2)(C). The phrases "notwithstanding *any* other provision of law" and "*no* court" are sweeping and unqualified. Yet, just to avoid misunderstanding, Congress added what this Court has characterized as an "unmistakable zipper clause," *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999):

> Judicial review of *all* questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove and alien from the United States under this subchapter shall be available *only* in judicial review of a final order under this section.

8 U.S.C. § 1252(b)(9) (emphasis added).

Despite the clarity and breadth of these words, the Second Circuit held that these provisions of IIRIRA did not strip the district court of jurisdiction over St. Cyr's habeas corpus petition. U.S. Pet. App. 5a–6a. The language of IIRIRA cannot bear the interpretation given it by the court of appeals. Even assuming that § 1252(b)(9) can be fairly read to preserve some form of judicial review for felonious aliens—and that is doubtful—§ 1252(a)(2)(C) removes all doubt. The words "[n]otwithstanding *any other* provision of law" sweep too widely to omit 28 U.S.C. § 2241. 8 U.S.C. § 1252(a)(2)(C) (emphasis added). "*[N]o* court" assuredly includes district courts. *Id.* (emphasis added). And once having defined the subject to encompass every court and reject the qualification of every law, the predicate goes on to deny in categorical

and mandatory language "jurisdiction to review *any* final order of removal against an alien who is removable by reason of having committed" an aggravated felony. *Id.* (emphasis added). When combined with Congress's express repeal of the section formerly providing for habeas corpus review for aliens held pending removal, IIRIRA § 306(b), 110 Stat. 3009-612, and its express provision for habeas corpus jurisdiction in limited circumstances, 8 U.S.C. § 1252(e)(2), Congress's intent becomes indisputable. Congress meant to ensure the prompt removal of the most dangerous class of aliens, those who have committed an aggravated felony, by denying them the opportunity to delay their departure through collateral review. Not incidentally, it meant to prevent the courts from unduly interfering with the exercise of executive discretion. *Reno* v. *American-Arab Anti-Discrim. Comm.*, 525 U.S. 471, 486 (1999).

Given this reading of IIRIRA, a simple chain of reasoning appears to dictate the result. IIRIRA denies discretionary relief to all aliens ordered removed because of the commission of an aggravated felony and deprives all courts of judicial review in such cases. St. Cyr committed an aggravated felony. Therefore, no federal district court has jurisdiction to hear St. Cyr's petition for habeas corpus. In fact, that is exactly the conclusion drawn by the Seventh Circuit. *See Yang* v. *INS*, 109 F.3d 1185, 1195 (7th Cir. 1997) ("IIRIRA abolishes even review under § 2241, leaving only the constitutional writ, unaided by statute."). However, the Second Circuit noticed what it considered a wrinkle in this otherwise tidy bit of reasoning. It questioned whether "[a]n interpretation that repeals habeas corpus jurisdiction as it applies to legal

permanent residents ordered removed from the country because of prior crimes" might not "raise a serious constitutional question under the Suspension Clause of the Constitution." U.S. Pet. App. 68a. Indeed, the court clothed its skepticism in substance by invoking the canon of constitutional doubt as a reason to adopt its strained interpretation of IIRIRA. *See id.* at 66a–67a. It need not have been so concerned. As in *Miller* v. *French*, 530 U.S. 327, 341–42 (2000), the warning of an impending collision between and statute and Constitution turns out to be a false alarm.

III. THE SUSPENSION CLAUSE IS NOT INFRINGED BY CONGRESS'S ELIMINATION OF DISTRICT COURTS' HABEAS CORPUS JURISDICTION IN CASES INVOLVING THE REMOVAL OF FELONIOUS ALIENS

The Second Circuit's constitutional doubt deserves to be explored with some precision. It said that "[a]n interpretation that repeals habeas corpus jurisdiction as it applies to legal permanent residents ordered removed from the country because of prior crimes" might "raise a serious constitutional question under the Suspension Clause of the Constitution." U.S. Pet. App. 68a. In other words, the court construed IIRIRA as not repealing habeas corpus jurisdiction for aliens who have committed aggravated felonies because, it said, the contrary reading of IIRIRA would be tantamount to conceding that IIRIRA suspends the writ of habeas corpus for such aliens. And *that*, the Second Circuit implied, might well violate the Suspension Clause.

Thus stated, the Second Circuit's constitutional doubt falls into a peculiar context, composed of three overlapping areas of constitutional law. First, there

is the Suspension Clause itself. Second, there is Congress's power to control immigration and naturalization. And third, there is Congress's power to control the jurisdiction of "inferior courts." U.S. Const. art. III, § 1. Whatever one might fairly say about an attempt by Congress to restrict habeas corpus jurisdiction in another context, the Court's decisions in the context of this case compel the conclusion that the Suspension Clause poses no bar on Congress's power to restrict or eliminate the habeas corpus jurisdiction of district courts in cases where an alien found guilty of an aggravated felony challenges a final removal order issued against him.

A. Suspension Clause

The Suspension Clause provides, "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." U.S. Const. art. I, § 9. "[W]hen we say the writ of habeas corpus, without addition, we most generally mean that great writ which is now applied for; and in that sense it is used in the constitution." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807); *see also* Joseph Story, Commentaries on the Constitution of the United States 482 (Carolina Academic Press 1987) (abridged ed., 1833) (describing the writ as "justly esteemed the great bulwark of personal liberty"). The Court has said that "the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is to secure release from illegal custody." *Preiser* v. *Rodriguez*, 411 U.S. 475, 484 (1973). "The underlying premise of the Great Writ is that only legal authority can justify detention." Richard H. Fallon, Jr., *et al.*, Hart & Wechsler's The

Federal Courts and the Federal System 1337 (4th ed. 1996); *see also* 3 William Blackstone, Commentaries *131 (describing habeas corpus as "the great and efficacious writ in all manner of illegal confinement").

However, the Suspension Clause was not originally understood to confer, by itself, the "privilege of the writ of habeas corpus." U.S. Const. art. I, § 9. "For the meaning of the term habeas corpus, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93–94 (1807). Indeed, Chief Justice Marshall, writing for the Court in *Ex parte Bollman*, understood the Suspension Clause not to imply an inherent habeas corpus jurisdiction in federal courts, but rather to suggest that Congress had an inherent duty to legislatively provide for such jurisdiction. Chief Justice Marshall's description of the First Congress, an especially accurate measure of the "contemporaneous exposition of the constitution," *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 420 (1821), makes this point clear:

> Acting under the immediate influence of this injunction, [the members of the First Congress] must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for it the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they give to all the courts the power of awarding writs of habeas corpus.

Ex parte Bollman, 8 U.S. at 95.

Despite this original understanding, the Second Circuit construed IIRIRA as preserving district courts' habeas corpus jurisdiction under 28 U.S.C. § 2241. U.S. Pet. App. 66a–67a. According to that court, a contrary reading would "raise a serious constitutional question under the Suspension Clause." *Id.* at 68a. This view of the Suspension Clause not only substantially departs from its meaning as originally understood, but it also threatens to resurrect a since discredited notion that restrictions on the scope of the statutory habeas writ almost invariably pose constitutional difficulties. *See, e.g., Sanders* v. *United States*, 373 U.S. 1, 11–12 (1963) (warning that alterations in modern habeas practice that "derogate from the traditional liberality of the writ . . . might raise serious constitutional questions" under the Suspension Clause); *Johnson* v. *Eisentrager*, 339 U.S. 763, 798 (1950) (Black, J., dissenting) (arguing that habeas corpus is "written into the Constitution" and that its availability "cannot . . . be constitutionally abridged by Executive or by Congress"); *see also United States* v. *MacCollom*, 426 U.S. 317, 322–23 (1976) (mentioning but avoiding a suspension clause claim).

Such an expansive interpretation of the writ conflicts with more recent decisions, which have increasingly recognized that the statutory writ and the Great Writ are not one and the same and that restrictions on the statutory writ are not unavoidably vulnerable to attack under the Suspension and Due Process Clauses. *Kuhlmann* v. *Wilson*, 477 U.S. 436, 445 n.7 (1986) (noting that the modern postconviction writ and the writ with which the suspension clause is concerned may not be the same); *Swain* v. *Pressley*,

430 U.S. 372, 384 (1977) (Burger, C.J., concurring) (contending that the suspension clause constitutionalizes the writ only as it existed when the Constitution was adopted); *Bounds* v. *Smith*, 430 U.S. 817, 835 (1977) (Burger, C.J., dissenting) (same); *id.* at 840 (Rehnquist, J., dissenting). More to the point, this Court has specifically distinguished between 28 U.S.C. § 2241 and the Great Writ, holding that the former offers greater leeway for collateral review than the latter. *See United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954).

Such a question of constitutional interpretation ought to be resolved in favor of original understanding. *See McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 359 (1995) (Thomas, J., concurring). This is particularly true when, as where, an originalist inquiry appears to affirmatively exclude the competing interpretation. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, (1989). If the Court selects this course, the analysis is complete. As originally understood, the Suspension Clause vests no inherent habeas corpus jurisdiction in federal courts. It follows that the Second Circuit was mistaken to rely on the canon of constitutional doubt as a reason to adopt its strained reading of IIRIRA.

But even if the Court wishes to assume that "the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789," *Felker* v. *Turpin*, 518 U.S. 651, 664 (1996), the Second Circuit's view of the Suspension Clause must be rejected. *Felker* itself demonstrates that not every restriction on the statutory writ amounts to a suspension of the constitutional writ. *Id.* at 664. Furthermore, the question presented is not exhausted by the

Suspension Clause alone. Because a correct interpretation of the Constitution generally "depend on a fair construction of the whole instrument," *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819), a discussion of constitutional issues beyond the Suspension Clause is necessary. These issues include Congress's powers to control immigration and to regulate the jurisdiction of inferior courts. Only with such a holistic perspective is it possible to accurately assess the constitutional doubt expressed by the Second Circuit. So to the congressional power over immigration we now turn.

B. Immigration

Article I delegates to Congress the authority "[t]o establish a uniform rule of naturalization." U.S. Const. art. I, § 8. This power over naturalization is commonly described as "plenary," *e.g.*, *Carlson* v. *Landon*, 342 U.S. 524, 534 (1952), and encompasses the formulation of policies concerning the detention of aliens against whom removal proceedings have been commenced or a final order of removal has been entered. See *Reno* v. *Flores*, 507 U.S. 292, 305–06 (1993). When "aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders." *Carlson*, 342 U.S. at 534.

The scope of judicial review over a final removal order is correspondingly narrow. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952) ("Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."); *Fong Yue Ting* v. *United*

States, 149 U.S. 698, 731 (1893) ("[T]he judicial department cannot properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject").

Besides the breadth of congressional power, judicial deference is proper because laws governing immigration primarily call for the exercise of political judgment and therefore fall close to the line separating justiciable from political questions. The Court has repeatedly acknowledged that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government" and that "[s]uch matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588–89 (1952); *see Carlson* v. *Landon*, 342 U.S. 524, 537–38 (1952) ("The power to expel aliens, being essentially a power of the political branches of government, . . . may be exercised entirely through executive officers, with such opportunity for judicial review of their action as Congress may see fit to authorize or permit.") (internal quotation marks omitted).

Moreover, this Court has repeatedly held that deportation (or its contemporary equivalent, removal) is not punishment. *Reno* v. *American-Arab Anti-Discrim. Comm.*, 525 U.S. 471, 491 (1999); *Carlson* v. *Landon*, 342 U.S. 524, 537 (1952); *Fong Yue Ting* v. *United States*, 149 U.S. 698, 730 (1893). Although aliens who lawfully enter the United States are entitled to due process of law before being removed, *Landon*

v. *Plasencia*, 459 U.S. 21, 32–33 (1982),[2] proof of legal error, standing alone, does not rise to the level of a due process violation. *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 106 (1927). And legal error, not mistaken identity or official abuse, is all that St. Cyr claims. *See* U.S. Pet. App. 4a. He has therefore received all the process due under the Constitution.

Far from justifying a cramped view of congressional power, as the Second Circuit seemed to think, this case particularly calls for judicial deference. Indeed, the plenary nature of Congress's power over immigration and its basis in separation of powers principles means that constitutional doubt, if it exists at all, runs *in favor* of the government's interpretation of IIRIRA. For a decision by this Court permitting St. Cyr to pursue a collateral attack on his final removal order, despite the plain language of IIRIRA intending to preclude such an attack, may well embroil the judiciary in questions for which it has neither institutional competence nor a constitutional mandate. In short, that the question presented arises in the context of immigration means that the plain meaning of IIRIRA

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[2] Due process concerns should not affect the analysis of the question presented, because aliens subject to removal routinely receive the essentials of due process, notice and an opportunity to be heard, just as St. Cyr did in this case. *See* U.S. Pet. App. 3a–4a. In addition, at a hearing before the immigration judge the INS bears the burden of proving by "clear, unequivocal, and convincing" evidence that the alien is removable. *Woodby* v. *INS*, 385 U.S. 276, 286 (1966). Persons alleging U.S. citizenship enjoy even greater protection: colorable claims of citizenship must be initially resolved by a court instead of an executive agency. *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922). More than this the Constitution does not require.

should be given particular respect, not distorted to avoid a non-existent question under the Suspension Clause. *See United States ex rel. Eichenlaub* v. *Shaughnessy*, 338 U.S. 521, 528 (1950).

C. Article III

St. Cyr's quest to obtain collateral review fares no better under Article III. Congress holds the power "[t]o constitute tribunals inferior to the Supreme Court," U.S. Const. art. I, § 8, but its exercise is discretionary. *See id.* at art. III, § 1. This "Madisonian Compromise," Richard H. Fallon, Jr., *et al.*, Hart & Wechsler's The Federal Courts and the Federal System 8 (4th ed. 1996), leaves Congress largely free to structure the jurisdiction of lower federal courts. *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 57–60, 67 (1982) (opinion of Brennan, J.); *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856). The Nation survived for more than a century before inferior federal courts had federal-question jurisdiction. Indeed, until 1976 federal-question jurisdiction was restricted by an amount-in-controversy requirement that left many potential federal claims entirely without a federal forum. None of these limitations offended Article III.

Neither does IIRIRA, which eliminates the habeas corpus jurisdiction of district courts when asked to review the final removal order of an alien who has committed an aggravated felony. *See Yang* v. *INS*, 109 F.3d 1185, 1195 (7th Cir. 1997). Unless Article III compels Congress to vest in inferior federal courts as much judicial power as Article III allows them to possess—a wholly insupportable interpretation of

Article III, given the Madisonian Compromise—it poses no obstacle to IIRIRA's provisions stripping district courts of habeas corpus jurisdiction over felonious foreigners.

* * *

Thus if pressed to say whether the United States Congress may bar aliens guilty of aggravated felonies from receiving discretionary relief *and* strip district courts of jurisdiction to hear their claims, the Court's decisions interpreting the Suspension Clause and Congress's power over immigration and lower court jurisdiction mean that one ought to answer "yes." Deciding how much judicial review to give criminal aliens falls well within the scope of authority granted by the Constitution to the political branches. Congress enacted IIRIRA for the legitimate purpose of "abbreviat[ing] the process of judicial review . . . in order to frustrate certain practices . . . whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts." *Foti* v. *INS*, 375 U.S. 217, 224 (1963). In this sense IIRIRA reflects the reality that "in a deportation proceeding . . . as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *INS* v. *Doherty*, 502 U.S. 314, 321–325 (1992). Certainly, St. Cyr's four-year-long quest to obtain discretionary relief eliminated by an Act of Congress vividly illustrates the problem Congress has attempted to address.

What St. Cyr so plainly wants is another bite at the apple, which is exactly what Congress has tried to prevent in cases like his. "Congress wanted to expedite the removal of criminal aliens from the United

States by eliminating judicial review, not to delay removal by requiring aliens to start the review process in the district court rather than the court of appeals." *Yang* v. *INS*, 109 F.3d 1185, 1195 (7th Cir. 1997). Far from representing a momentary fit of xenophobia, IIRIRA reflects Congress's measured judgment that the Nation is safer when the most dangerous category of foreigners, those who commit aggravated felonies, are promptly removed from our shores. Contrary to the Second Circuit's reasoning, nothing in the Constitution prevents the country's elected representatives from making that choice.

CONCLUSION

For the foregoing reasons the judgment of the U.S. Court for the Second Circuit should be reversed.

Respectfully submitted,

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